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IN THE

Supreme Court of the United States

October Term, 1956

No. 345

CHARLES SILVER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CHARLES SILVER,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles Silver prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 25, 1956.

OPINIONS BELOW

The opinions of the Court of Appeals in this proceeding have not yet been reported. These opinions are set forth in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1956. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

The questions presented in this case involve the sufficiency of the indictment to charge a crime against petitioner, and the propriety of the cross-examination of petitioner as a witness in his own behalf on the trial.

STATUTES INVOLVED

The statute involved in this case is Title 18, United States Code (1952 ed.), Section 1001 (62 Stat. 749); and Federal Rules of Criminal Procedure, Rules 7(c) and 52(a). The text of these statutory provisions is set forth in Appendix B hereto.

STATEMENT OF THE CASE

The Indictment

Petitioner Charles Silver was indicted on two counts which charged that he wilfully and knowingly made false statements in a matter within the jurisdiction of the Internal Revenue Service of the Treasury Department, in violation of Title 18, United States Code, Section 1001.

In the first count, the charge was based on petitioner's statement on April 6, 1954 "that he did not see one Carol Anderson during the months of January, February, March or April of 1953". The second count is based on petitioner's statement on April 16, 1954 to the effect that he had not at any time used an "alias or name other than his own".

Neither of the two counts alleged that the false statements set forth therein were material to the investigation

then in progress; nor is there any statement in the indictment of facts from which the materiality of the alleged false statements could be inferred.

The Record

The record of this case before the Court of Appeals was a typewritten appendix of portions of the record of trial of the District Court for the Southern District of New York. A certified copy of the typewritten appendix and judgment and opinions of the Court of Appeals is submitted with this petition.*

The Facts

Petitioner Charles Silver was a member of the Internal Revenue Service of the Treasury Department from September 1933 for twenty years until his resignation in 1953. He served in various capacities as a Revenue Agent, Deputy Collector and Collection Officer during his tenure with the Revenue Service. He is married and the father of two children (255-258).

In January 1953, the Intelligence Unit of the Internal Revenue Department initiated an investigation of petitioner based upon a statement made by a convict Maxwell Berner in Sing Sing Prison, that he paid bribes to petitioner of $500 and either $300 or $350 (59). Special Agent Bright testified he interviewed the convict at Sing Sing Prison, who claimed that these payments were witnessed by "an old time madam", who formerly accompanied Mr.

* Wherever numbers in parentheses are indicated, they refer to pages in the Appendix.

Silver to the harness races (60). The convict claimed he did not know the name of the "madam", but would give the information to the Warden when he refreshed his recollection. Thereafter, Special Agent Bright was advised by the Warden of Sing Sing Prison that the convict had recalled that the woman's name was "Carol", but that he could not recall her last name (60).

On March 31, 1953, Special Agent Bright interrogated petitioner and the transcript of this interrogation was offered in evidence as Government's Exhibit 2 (63). He was questioned whether he knew a woman by the name of Carol during 1947 or 1948. Petitioner gave her last name as Anderson and admitted that he accompanied her to the trotters. He gave a general description of this "Carol Anderson", and stated that the last time he had any information about her she had lived in Westchester County.

Special Agent Bright testified that the results of his investigation to that point did not justify the filing of any charges against petitioner (68). Petitioner had resigned from the revenue service on January 3, 1953, before he was interrogated. In August 1953, he applied for reinstatement. He was directed to report back to work on November 9, 1953 (246). He continued with the Internal Revenue Service until October 1954 (246). After petitioner had been restored to his position in August 1953, the investigation was reactivated (69).

Based upon the information given by petitioner during his interrogation on March 31, 1953, Special Agent Bright was able to discover that Carol Anderson or Caroline Anderson had changed her name to Caroline Turchin (71),

and she had been convicted for running a disorderly house and was incarcerated in the Westchester Prison at Eastview (73).

Special Agent Bright visited the prison on April 5, 1954 and discovered that she had been released the previous summer but left no forwarding address. However, the records of the prison indicated that she was visited by a "Charles Anderson" (74) whose description, according to the Special Agent, fitted that of petitioner.

On April 6, 1954, petitioner was again interrogated by Special Agent Bright at the office of the Regional Inspector. Petitioner was asked whether he had seen Carol Anderson subsequent to January 1, 1953. He answered that he did see Carol Anderson and expressed the belief that it was prior to that date; he denied that he saw her in January, February, March, April or May of 1953.

Petitioner was again interrogated on April 16, 1954. He denied that he had at any time used an "alias or name other than his own". (Exhibit 3.)

Special Agent Bright testified that he took the photograph of petitioner and that guards at the prison identified him as the person who had visited Carol Anderson or Carol Turchin in prison in the early part of 1953 (81).

Carol Anderson was located in May 1954 as a result of further information furnished by the warden (123). She was questioned on June 1, 1954 and she denied that she saw any moneys passed or bribes paid by the convict Berner to petitioner (134).

Petitioner was indicted on two counts which set forth that he wilfully made the aforesaid false statements;

however, the indictment did not allege that the false statements were material and there is no statement of facts pleaded from which the materiality of the alleged false statements could be inferred.

Prior to trial petitioner moved to dismiss the indictment for insufficiency in law in that there was no pleading of facts that the false statements were material, and for a bill of particulars (5-8). District Judge Gregory F. Noonan denied the motion to dismiss the indictment, and denied the motion for a bill of particulars without prejudice to renewal (9).

The Government, however, furnished a bill of particulars in which it was stated that the question whether petitioner had seen Carol Anderson between January and April 1953 was material because she was sought by the Internal Revenue Service in connection with her witnessing the payment of an alleged bribe to petitioner in 1950 (10). There was no statement in the bill of particulars as to the materiality of the statements as to the use of an alias by petitioner.

Petitioner testified on the trial as a witness in his own behalf (255). He admitted he visited Carol Anderson in prison during the month of February 1953 (264), and denied he knew her whereabouts after her release (265). He denied he intended to mislead the Special Agent and pointed to the fact that it was he who furnished voluntarily and willingly the last name of the woman first identified as "Carol" and gave her possible whereabouts (273-275, 279, 280). He also referred to the fact that he had voluntarily admitted in his March 31, 1953 interrogation that he had seen her prior to his interrogation.

He testified that the question put to him about the use of an "alias", he associated with the question immediately preceding. The question and the answer which were the basis of the second count appeared in the following setting (278-279):

> "Q. Have you been arrested for any reason other than traffic offenses during this time? A. Never—before or after.
>
> Q. Have you at any time used an alias, or name other than your own? A. No, sir."

Petitioner denied he ever intended to interfere with the investigation by the Internal Revenue Service or to impede it (289). Petitioner gave to the Internal Revenue Service a complete report of his financial net worth (296-297) and small discrepancies were in his favor (297).

Beginning with page 351, the Assistant United States Attorney began an extended cross-examination of petitioner's illicit relationship with Carol Anderson and his wife's knowledge of this relationship (351). There was strenuous objection to this line of questioning by petitioner's attorney (354), but the trial judge permitted the interrogation to continue along this line.

Petitioner was convicted on both counts and sentenced to a term of one year imprisonment on Count One, and a period of three years probation on Count Two, to follow the service of the prison sentence. Bail pending appeal was granted petitioner by order of the Court of Appeals, which bail was continued pending the proceedings in this Court.

REASONS FOR GRANTING THE WRIT

The first question presented relates to the sufficiency of the indictment to charge a crime against petitioner, with the Court of Appeals for the Second Circuit in this case specifically declining to follow the Court of Appeals for the Fifth Circuit in *Rolland* v. *United States*, 200 F. (2d) 678, cert. den. *United States* v. *Rolland*, 345 U. S. 964, to the effect that under the statute in question (Title 18, U. S. C. Section 1001) the materiality of the alleged false statements must be pleaded in the indictment. As a matter of fact both the Fifth Circuit and District of Columbia Circuit Courts of Appeals have each held that materiality must be charged in the indictment under this statute, the latter court so holding in *Freidus* v. *United States*, 223 F. (2d) 598. Moreover the judges of the Second Circuit are divided as to the underlying reason for holding the pleading sufficient in this case, with Chief Judge Clark for the majority holding that under the second clause of the section, on which this indictment is grounded, materiality is not an essential element of the crime charged. Circuit Judge Frank disagreed, concurring in the result however for the reason that the pleading "necessarily by implication imports an allegation that the false statements were material". Both opinions specifically disagreed with *Rolland* v. *United States*, 200 F. (2d) 678 (5th Cir.).

The second question presented relates to the propriety of the cross-examination of petitioner as a witness in his own behalf as to his meretricious relationship with the woman Carol Anderson.

The questions presented in this case are of great importance in the interpretation of Title 18, United States Code,

Section 1001 and the administration of Federal criminal law.

1. The indictment in this case, which is set out verbatim in footnote 1 of Chief Judge Clark's opinion, reprinted *infra*, pp. 16-17, concededly does not allege that the false statements charged were material to the investigation before the Internal Revenue Service. The statute under which this indictment is laid contains two clauses (Title 18, U. S. C., Sec. 1001). The first clause relates to the falsification or concealment of a fact by some trick or scheme and the statute specifically requires that the fact be material. The second clause covers false or fraudulent statements or representations. There is no reference to materiality in this clause. If materiality is an essential element of a crime charged under the second clause, then clearly it must be alleged in the indictment.

In *Rolland* v. *United States*, 200 F. (2d) 678, cert. den., *United States* v. *Rolland*, 345 U. S. 964, the precise question before the Court was the sufficiency of an indictment which failed to allege that a false statement under the second clause of Section 1001 was material. Chief Judge Hutcheson considered the second clause of Section 1001 and held that the false statement had to be material and that an indictment was bad after conviction for failure to allege that the false statement was material or to set forth facts from which such materiality appeared. This ruling was followed in *Freidus* v. *United States*, 223 F. (2d) 598, by the Court of Appeals for the District of Columbia Circuit, where the Court wrote at page 601:

> "One portion of Sec. 1001 refers to wilfully and knowingly falsifying, concealing or covering up 'a *material* fact.' On the other hand, the part here

involved, without expressly mentioning materiality, prohibits 'any false, fictitious or fraudulent statements or representations.' We think, however, that this highly penal statute must be construed as requiring a material falsification. The legislative purpose strongly implies that only material false statements were contemplated, i.e., statements that could affect or influence the exercise of a governmental function."

In other statutes dealing with false statements and in statutes dealing with false swearing, materiality of the alleged false statement is an essential element of the crime. The perjury statute specifically provides that the false swearing must be as to a material matter, Title 18, U. S. C. Sec. 1621. The statute prohibiting false statements by veterans in claims for compensation or insurance specifically provides that the statements must concern material matters, Title 38, U. S. C. Sec. 553. False statements in respect to claims for pensions must be as to material facts, Title 38, U. S. C. Section 712. The same applies to false statements in insurance claims under the National Service Life Insurance Act, Title 38, U. S. C. Section 814.

In the first clause of Section 1001, covering falsification or concealment of a fact by trick or scheme, the false fact must be material. There is no apparent reason why one standard should govern the first clause and another should govern the second clause covering false statements. While the intention of Congress is by no means clear with respect to the second clause, we do not believe that the omission of "material" from the second clause was intentional.

In the present case, the testimony given by petitioner to Agent Bright was reduced to writing, subscribed by

was cured by the furnishing of the bill of particulars as to Count One at least, this argument would be insufficient in law. *Hagner* v. *United States*, 285 U. S. 427, as approved in *United States* v. *Debrow*, 346 U. S. 374. See also *United States* v. *Tornabene*, 222 F. (2d) 875; *Grimsley* v. *United States*, 50 F. (2d) 509.

It is respectfully submitted that the judicial interpretation of Section 1001 of Title 18, U. S. C. requires clarification by this Court and the conflict of opinion among the Circuits requires resolution.

2. In the cross-examination of petitioner who testified in his own behalf on the trial, the prosecutor undertook a lengthy interrogation of petitioner as to his meretricious relationship with the woman Carol Anderson. The trial judge believed this vicious type of testimony was admissible on some theory that petitioner had "opened the door" (209) by his direct testimony. The sole purpose of this cross-examination was to humiliate and degrade petitioner in the eyes of the jury and to increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character.

The admission of this type of cross-examination violates the rule laid down in *United States* v. *Provoo*, 215 F. (2d) 531, affirmed 350 U. S. 857. See also *Packineau* v. *United States*, 202 F. (2d) 681; *Echert* v. *United States*, 188 F. (2d) 336; *Middleton* v. *United States*, 49 F. (2d) 538, 540; *Templeton* v. *United States*, 151 F. (2d) 706; *Ross* v. *United States*, 93 F. (2d) 950.

In the *Provoo* case, former Chief Judge Swan of the Second Circuit stated:

> "As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of

> moral turpitude are not the proper subject of cross-examination for impeachment purposes" (citing cases in footnote 6, page 536 of 215 F. (2d) 531).

In *Provoo,* the accused was charged with treason during World War II, and the subject matter of the improper cross-examination was his homosexuality. If we substitute adultery for homosexuality in the present case, and that this petitioner is charged with making false statements during a revenue service investigation rather than treason, the language of Judge Swan is pertinent and apt:

> "As for reason, we do not conceive that inquiry into every accusation of criminal or vicious conduct will further the search for truth. Where, as here, the defendant's general character has not been put in issue, it is difficult to justify any examination other than into the trait of veracity. No authority has been cited which suggests that homosexuality indicates a propensity to disregard the obligation of an oath. The sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character. Permitting it was error.
>
> "The error was plainly prejudicial. Indeed we can conceive of no accusation which could have been more degrading in the eyes of the jury nor more irrelevant to the issue of treason on which he was being tried. On the main appeal the judgment must be reversed and the cause remanded for a new trial" (page 537 of 215 F. (2d) 531).

It is respectfully submitted that for the foregoing reasons this case warrants review by certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

August 23, 1956.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 393—October Term, 1955.
(Argued June 7, 1956 Decided July 25, 1956.)
Docket No. 24072

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES SILVER,

Appellant.

Before:

CLARK, *Chief Judge,*
and FRANK and HINCKS, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, William B. Herlands, Judge.

Charles Silver appeals from his conviction of violation of the false statement statute, 18 U. S. C. §1001. Affirmed.

MARTIN CARMICHAEL, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Dennis C. Mahoney, Asst. U. S. Atty., New York City, on the brief), *for appellee.*

DANIEL H. GREENBERG, New York City (Irving Spieler, New York City, on the brief), *for appellant.*

Appendix A

CLARK, *Chief Judge*:

Defendant was indicted under the false statement statute, 18 U. S. C. §1001.[1] The indictment had two counts. The first charged that Silver had falsely stated that he had not seen one Carol Anderson early in 1953; the second charged that he lied when he denied using an alias.[2] Before trial, defendant moved to dismiss the indictment; the motion

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[1] 18 U. S. C. §1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] The two counts of the indictment are as follows:

"The Grand Jury charges:

"On or about the 6th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he did not see one Carol Anderson during the months of January, February, March or April of 1953, whereas, in truth and in fact, as the defendant then and there well knew, he had seen the said Carol Anderson during that period. (Title 18, Section 1001, United States Code).

"SECOND COUNT

"The Grand Jury further charges:

"On or about the 16th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of

was denied. After trial and verdict of guilty, the judge denied defendant's motion for a judgment of acquittal.

The evidence at the trial was as follows: The allegedly false statements had been made to an Internal Revenue special agent during an investigation concerning a charge by a convict that he had paid bribes to Silver while the latter was in the employ of the Internal Revenue Bureau. The convict who allegedly paid the bribes had reported that the payments were witnessed by "an old time Madam" named "Carol" who had formerly accompanied Silver to harness races. On March 31, 1953, the special agent questioned Silver as to whether during 1947 or 1948 he knew a woman by the name of Carol. Answering, Silver gave her last name as Anderson, described her, and stated that he last heard that she lived in Westchester County. It was subsequently discovered that Carol Anderson had changed her name to Carol Turchin and had been incarcerated in the Westchester Prison at Eastview after being convicted of running a disorderly house. The prison records indicate that she had been visited in February, 1953, by a "Charles Anderson," whose description, according to the special agent, fits Silver's. The special agent testified that the guards at the prison, shown a picture of Silver, identified him as the person who had visited Carol Anderson early in 1953. There was also evidence that Silver saw her in

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a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he had not at any time used an alias or name other than his own, whereas, in truth and in fact, as the defendant then and there well knew, he had used an assumed name, namely Charles Anderson, on at least one occasion in 1953. (Title 18, Section 1001, United States Code)."

April, 1953, and met her on her release from prison in May, 1953. On April 6, 1954, Silver was again interrogated by the special agent. When asked whether he had seen Carol Anderson after January 1, 1953, he expressed the belief that he had seen her before that date. He denied that he saw her in January, February, March, April, or May, 1953. Silver was questioned by the special agent again on April 16, 1954, when he denied he had ever used an alias or name other than his own.

At the trial, Silver testified in his own behalf. He admitted visiting Carol Anderson in prison in February, 1953, but denied that he intended to mislead the special agent, and said that he had misunderstood the question put to him concerning the use of an alias. The jury found him guilty on both counts. He was sentenced to one year on each count, with the sentence on the second count suspended and a three-year period of probation imposed. This appeal followed. There are two assignments of error, first that the indictment is legally insufficient because it did not allege that the false statements were material and second that defendant was subjected to an improper and prejudicial cross-examination.

First. Section 1001 contains two clauses. The first relates to the willful falsification or concealment by "trick, scheme, or device" of a "material fact"; the second covers "false, fictitious or fraudulent statements or representations." The indictment charged a crime under the second clause, which, unlike the first, does not include the term "material." The defendant contends, however, that the second clause requires proof of the materiality of the false

statements, citing *Rolland* v. *United States,* 5 Cir., 200 F. 2d 678, certiorari denied *United States* v. *Rolland,* 345 U. S. 964; and *Freidus* v. *United States,* D. C. Cir., 223 F. 2d 598. On that basis he maintains that the trial judge erred in not granting his motion to dismiss the indictment for legal insufficiency, in that it did not allege that the false statements related to a material fact. Actually the evidence fully supported the materiality of the statements and, at the request of both counsel, the judge submitted the issue to the jury under a charge correctly stating the test of materiality. *United States* v. *Moran,* 2 Cir., 194 F. 2d 623, 626, certiorari denied *Moran* v. *United States,* 343 U. S. 965; *United States* v. *Goldstein,* 2 Cir., 168 F. 2d 666, 671. The indictment followed the language of the statute, *United States* v. *Achtner,* 2 Cir., 144 F. 2d 49, 51; *United States* v. *Debrow,* 346 U. S. 374, 377, and was fully adequate under F. R. Cr. P., rule 7(c), to inform defendant of the essential facts constituting the offense. It has been held that materiality need not be charged under this statute. *Fisher* v. *United States,* 9 Cir., 231 F. 2d 99, 102; *United States* v. *Lange,* D. C. S. D. N. Y., 128 F. Supp. 797; *United States* v. *Varano,* D. C. N. D. Pa., 133 F. Supp. 867; and see also *United States* v. *Leviton,* 2 Cir., 193 F. 2d 848, certiorari denied *Leviton* v. *United States,* 343 U. S. 946. To the extent that *Rolland* v. *United States, supra,* 5 Cir., 200 F. 2d 678, is contra, we are constrained to disagree with it.

But a majority of the court believe further that there is no separate and additional requirement of materiality, beyond the explicit elements of the crime as defined in the

statute, which must be shown to complete proof of the offense. Since the cases above disclose some diversity in approach, we are met with no binding precedent and therefore turn to the statute itself. We suggest that it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves. Even if the reason for including the requirement in the first clause and omitting it in the later clause could not be discerned, it would nevertheless seem that the differences must still be observed. But there is properly a distinction between a scheme of concealing or covering up a "material fact" and the making of a false, fictitious, or fraudulent statement. An attempt to conceal or cover up may properly be limited only to facts which are important and material. On the other hand, a fact deliberately or willfully misstated in a matter of appropriate governmental inquiry seems properly punishable even if it is only a gratuitous red herring. As such it can of course obstruct, delay, or deflect an inquiry which is pressing home to uncover fraud upon the government. So here the defendant's lies as to his use of an assumed name and as to the dates when he saw Carol Anderson were disruptive of the government's search for the facts; they should properly be subject to punishment even if their connection with the purpose of the inquiry does not immediately appear, without necessity for formal explanation as to why the questions are important.

It must be remembered that in any event the charge must concern a "matter within the jurisdiction of any [i.e., some] department or agency of the United States." In all proba-

bility a lie in a matter within such jurisdiction will rarely, if ever, prove to be really immaterial; this initial requirement, coupled with the need of proving willful intent, will prevent the possibility of purely foolish or wholly insubstantial charges. But even if this is so, it is but an added reason against importing into the statute an unnecessary but vague abstraction which will then in turn call for interpretation and reinterpretation. *United States* v. *Gilliland,* 312 U. S. 86, 93, applying the broad language of the statutory provision in declining to restrict it to cases involving pecuniary or property loss to the United States, lends support to this view. Incidentally this simpler and more direct interpretation of the statutory intent will eliminate the basis for such purely technical objections as the one advanced by the defendant here. Accordingly we overrule the defendant's first assignment of error.

Second. Citing *United States* v. *Provoo,* 2 Cir., 215 F. 2d 531, defendant also contends that questions asked by the prosecutor concerning his illicit relations with Carol Anderson were immaterial and intended only to prejudice the jury against him. We all think the *Provoo* case inapposite. There, although the defendant had not put his character in issue, the prosecutor, on cross-examination, asked him questions concerning his homosexuality. We reversed, holding the questions irrelevant and highly prejudicial. But here the defendant did put his character in issue. He testified, on direct, that he had lied to the revenue agent with the high purpose of protecting the feelings of third persons, rather than with the intent to mislead. During the direct examination of the defendant, when his

counsel began this line of inquiry, the prosecutor warned that, if such testimony were given, he would be forced, on cross-examination, to pursue the subject. The judge then stated: "The door is open and everybody can walk right in." Defendant's counsel commented: "That is right. Yes, I want the jury to hear the whole story." We think that the prosecuting attorney's questions concerning defendant's relations with Carol Anderson were relevant, and that the defendant waived any right to object that the questions were improperly prejudicial.

Affirmed.

FRANK, *Circuit Judge*, concurring:

I concur in the result and in all that my colleagues say except that I disagree concerning the interpretation of the statute. I think that *Rolland* v. *U. S.*, 200 F 2d 678 (C. A. 5) and *Freidus* v. *U. S.*, 223 F. 2d 598 (D. C. Cir.) correctly hold that the second clause of Section 1001 requires proof of the materiality of the false statements.[1]

However, I think the allegations of the indictment sufficient, and that they satisfied the requirements of Federal Rule of Criminal Procedure 7(c). In statutory terms, the indictment alleged that the false statements were made "in a matter within the jurisdiction of a department of the United States." If the statute, correctly interpreted, makes materiality an essential part of the crime, then the

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[1] It will be noted that both parts of the section, not merely the second part, are prefaced by the clause "within the jurisdiction of any department or agency of the United States."

statute, although not expressly referring thereto, nevertheless, by implication, imports the element of materiality. Accordingly, the indictment, using the very words of the statute, necessarily by implication imports an allegation that the false statements were material. To put it differently, if the statute, without mentioning materiality, implies that element, then so does the indictment; the shorthand expression sufficient in the one is equally sufficient in the other. Consequently to dismiss the indictment merely because it omitted the word "material" would be irrational and contrary to modern pleading practice.[2]

[2] To the extent that *Rolland* v. *U. S.*, 200 F. 2d 678 (C. A. 5) is contra, I disagree with it.

APPENDIX B

Title 18, United States Code, Section 1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

Rules 7(c) of the Federal Rules of Criminal Procedure:

"Rule 7. The Indictment and the Information.

• • • • •

(c) Nature and contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in

the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Rule 52(a) of the Federal Rules of Criminal Procedure:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

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399129—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 345

CHARLES SILVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–23; R. 612–619) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1956 (Pet. 15; R. 620). The petition for a writ of certiorari was filed on August 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an indictment drafted in the words of the false statement statute (which penalizes the making of a false statement in a matter within the juris-

diction of a department or agency of the United States) is defective for failure to allege materiality of the false statement. If so, whether the defect is a fatal one when a bill of particulars furnished defendant shows the materiality of the statement, the evidence establishes materiality, and the court's charge to the jury required it to find proof of materiality.

2. Whether the government's cross-examination of petitioner was improper.

STATUTE AND RULES INVOLVED

18 U. S. C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 7 (c), Federal Rules of Criminal Procedure, provides:

> *Nature and Contents.*—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference

in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 52 (a), Federal Rules of Criminal Procedure, provides:

Harmless Error.—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Petitioner was charged in a two-count indictment with knowingly making false statements in a matter within the jurisdiction of the Treasury Department, in violation of 18 U. S. C. 1001 (R. 3–4).[1] A motion to dismiss the indictment on the grounds, *inter alia,* that the materiality of the statements was not alleged, and

[1] The indictment was as follows:

"The Grand Jury Charges:

"On or about the 6th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he did not see one Carol Anderson during the months of January, February, March or April of 1953, whereas, in truth and in fact, as the defendant then and there well knew, he had seen

for a bill of particulars, was denied (R. 5–9). A bill of particulars was nevertheless filed. It specified that petitioner's false statements, *i. e.*, that he had not seen one Carol Anderson during the months of January, February, March or April of 1953, and that he had not used an alias in 1953, were material in that the Treasury Department was seeking to learn the whereabouts of Carol Anderson in order to ascertain whether she had witnessed bribes allegedly paid petitioner (R. 10). A jury found petitioner guilty (R. 608), and he was sentenced to one year's imprisonment on count one, and one year on count two, the latter sentence being suspended and petitioner placed on three years' probation following service of the sentence on count one (R. 2).

The following evidence was adduced at the trial:

A special agent of the Internal Revenue Service testified that in January, 1953, an investigation of petitioner, a long time employee of the Service who

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the said Carol Anderson during that period. (Title 18, Section 1001, United States Code).

"SECOND COUNT

"The Grand Jury further charges:

"On or about the 16th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he had not at any time used an alias or name other than his own, whereas, in truth and in fact, as the defendant then and there well knew, he had used an assumed name, namely Charles Anderson, on at least one occasion in 1953. (Title 18, Section 1001, United States Code)."

resigned on January 3, 1953 (R. 257), was initiated (R. 54). The investigation had its origin in statements of a convict in Sing Sing Prison that he had paid bribes to petitioner, and that the payments were witnessed by "an old time madam" named "Carol" (R. 59–61). Petitioner, when questioned on March 31, 1953, by the agent, denied accepting a bribe and admitted that around 1947 to 1948 he had known a woman named "Carol" whose last name he gave as "Anderson" and whose whereabouts, when last known to him, he gave as Westchester County (R. 62, 261–262, 264). No charges were filed against petitioner at that time for lack of substantiation of the convict's statements, but the investigation was reactivated when petitioner was restored to his position with the Internal Revenue Service in August 1953 (R. 68–69). Through the telephone company and the post office department, the investigating agent found that Carol Anderson had changed her name to Caroline Turchin (R. 70–71), that she had been convicted for running a disorderly house and that she had been sentenced to a term in Westchester Prison (R. 73). A visit by the agent to the prison on April 15, 1954, revealed that she had been released the previous summer and had left no forwarding address (R. 73). The prison records showed she had been visited in February 1953 by a "Charles Anderson" whose description fitted that of petitioner (R. 74).

On April 6, 1954, petitioner, questioned again by the agent, denied seeing Carol Anderson in January, February, March, or April of 1953 (R. 76). The agent

testified that his sole purpose in asking these questions was to find the Anderson woman so that he could question her about the bribes allegedly paid to petitioner and witnessed by her (R. 76). At an interrogation on April 16, 1954, petitioner denied that he had at any time used an alias or name other than his own (R. 80). These statements on April 6th and 16th form the basis of the two counts of the indictment.

Carol Anderson was eventually located in May 1954, as a result of information furnished by the warden of Westchester Prison (R. 127–129), and she denied that she saw any bribes paid to petitioner (R. 134).

Petitioner testified in his own behalf (R. 255–304). He admitted that he had visited Carol Anderson in jail and had taken gifts to her in February 1953 (R. 264, 299), but denied that he intended to mislead the agent in saying that he hadn't seen her during January, February, March, or April of 1953 (R. 279).[2] His explanation of the false statement as to use of an alias was that he thought the question related to the question immediately preceding it, which was (R. 277–278):

> Q. Have you been arrested for any reason other than traffic offenses during this time?
>
> A. Never—before or after.
>
> Q. Have you at any time used an alias, or name other than your own?
>
> A. No, sir.

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[2] He also admitted that when he gave the agent the name of "Carol Anderson", he knew she was listed in the phone book under the name of "Turchin" (R. 284).

On cross-examination petitioner admitted using an alias of "Charles Anderson" when he visited Carol Anderson in jail (R. 319–321).

Petitioner also explained on direct examination that he had told the agent he didn't know where Carol Anderson was, when he actually did know, because he "thought it unfair to her to have a stranger whom she had never met go up to visit her in jail" (R. 288), and because he didn't want his wife to be questioned by the agent, or to find out the type of person Carol was and that he had visited her in jail (R. 288–289). When petitioner began this explanation, government counsel warned (R. 290):

> Your Honor, before we get into this too deeply, I am loathe to object to this testimony inasmuch as intent is an element of this crime, but I want to have Mr. Spieler—Mr. Silver tell the jury as best he can what he had in mind. However, I feel that I should call Mr. Spieler's attention to the fact that this line of questioning may impose on me a duty to explore a line of questioning which to me will be distasteful and repugnant, but it will be my duty to inquire.

The court commented in reply that the door was open and everybody could walk right in (R. 290–291). Petitioner's counsel replied: "That is right. Yes, I want the jury to hear the whole story" (R. 291).

Over objection, the government on cross-examination questioned petitioner as to his relationship with Carol Anderson and his wife's knowledge of it, and it was brought out that he had had amorous relations with her (R. 355).

The question of the materiality of the false statements to the investigation being conducted by the Treasury Department was submitted to the jury at the request of counsel for both the government and the defense (R. 584–588). The court charged in part (R. 584–585, 586, 587):

> * * * I am going to charge you that it is for you to determine whether the questions put to the defendant on April 6, 1954, and April 16, 1954—and I am referring only to the two questions covered in the indictment—were material to the Treasury Department investigation then being conducted by Agent Bright * * * the question is whether the two queries that were put to the defendant by Agent Bright in connection with the investigation were material, whether they had a direct relationship, whether they had a connection of a substantial nature with regard to the inquiry then being conducted * * * and * * * related to a legitimate, proper and reasonable matter involved in the investigation * * * and * * * had a tendency or a natural operation of slowing up, delaying, dissuading, impeding or obstructing the investigation.

On appeal, the conviction was affirmed. The Court of Appeals held that the evidence amply showed the materiality of the questions to the investigation, that the factor of materiality was submitted to the jury under a proper charge, and that the indictment, being in the words of the statute, adequately apprised the petitioner of the charges against him as required by Rule 7 (c) of the Federal Rules of Criminal Procedure, *supra,* pp. 2–3, (Pet. 19). The court further

held that Congress did not specify materiality as an element of the crime of making a false statement in a matter within the jurisdiction of a department of the United States, and therefore it should not be implied by the courts (Pet. 19–21). Judge Frank, concurring, agreed in the result and all that his colleagues had to say except that he believed that the statute, by implication, did import the element of materiality (Pet. 22–23).

As to the allegedly improper cross-examination of petitioner, the Court of Appeals held that the questions as to petitioner's relationship with Carol Anderson were relevant and that petitioner had waived his right to object to the line of questioning when he opened up the issue on direct (Pet. 21–22).

ARGUMENT

1. The false statements statute, 18 U. S. C. 1001, *supra*, p. 2, under which petitioner was prosecuted, applies to "any matter within the jurisdiction of any department or agency of the United States" and consists of two clauses: the first makes willful concealment by trick, scheme or device a crime and requires that the concealment relate to "a material fact"; the second clause makes a willful false statement a crime, but contains no stipulation as to materiality. The indictment drafted in the words of the second clause contains no allegation of materiality.

Two circuit courts have held that there must be proof of materiality even under the second clause of 18 U. S. C. 1001. See *Rolland* v. *United States*, 200 F. 2d 678 (C. A. 5) and *Freidus* v. *United States*,

223 F. 2d 598 (C. A. D. C.) While petitioner urges a conflict because of the contrary view expressed by the majority below, that issue is not presented by this case since materiality, amply established by the evidence, was determined by the jury under a full and correct charge by the trial court. This being so, the sole issue here is one of pleading—whether petitioner must be retried because the indictment did not allege materiality, even though it was established by the evidence.

Under modern rules of pleading, an indictment which charges a statutory crime, as here, is generally regarded as sufficient if it follows the language of the statute, unless its generality either prejudices the defendant in the preparation of his defense, or endangers his constitutional guarantee against double jeopardy. *United States* v. *Debrow*, 346 U. S. 374, 377; *United States* v. *Achtner*, 144 F. 2d 49, 51 (C. A. 2). This indictment was phrased in the language of 18 U. S. C. 1001, and it is therefore incumbent upon petitioner to show how failure to allege materiality, conceding *arguendo* its relevance, prejudiced him either by hampering his defense or jeopardizing a future plea of *autrefois convict*. Petitioner makes no such showing of prejudice, and it is apparent from the record that he suffered none. Petitioner knew he had stated falsely, as charged in count one,[3] that he had not seen Carol Anderson at certain named times (R. 288) and that the agent who asked the question was looking for her as a possible witness to a bribe

[3] We do not discuss count two since the sentence on that count was suspended (R. 2).

petitioner had allegedly taken while employed by the Internal Revenue Service (R. 286). In any event, petitioner obtained a bill of particulars prior to trial which set forth the materiality of the statements in time for him to prepare his defense (R. 10). Ample evidence of materiality was presented to the jury, who went to their deliberations fully and correctly charged as to the test to apply in determining materiality (R. 60, 76, 584–588). The indictment was sufficiently definite as to names and dates to guard against the danger of another trial for the same statements (*supra*, pp. 3–4, fn. 1). As the Ninth Circuit found in *Fisher* v. *United States*, 231 F. 2d 99, 102, where it was also contended that the indictment failed to set forth the essentials of an offense under the second clause of 18 U. S. C. 1001 because materiality was not alleged:

> The Government contends that "materiality" is not an essential element of the crime of filing a false written document but that the term applies only to the first section of 18 U. S. C. § 1001 dealing with making a concealment of a material fact. *United States* v. *Lange*, D. C. S. D. N. Y. 1955, 128 F. Supp. 797; *United States* v. *Varano*, D. C. M. D. Pa. 1953, 113 F. Supp. 867. The language of Section 1001 seems to justify such a construction. However, even if an opposite construction is taken, appellant has not alleged that this defect in the indictment was prejudicial nor has he made any showing to this effect. Appellant knew the materiality of his statement. The statements ultimately proved were certainly material. If this is error, it is harmless error under F. R. Crim. P. 52 (a), 18 U. S. C.

The only case which indicates that an indictment for a false statement under the second clause of 18 U. S. C. 1001 must contain an allegation of materiality is *Rolland* v. *United States*, 200 F. 2d 678, 680 (C. A. 5);[4] and that decision, though it speaks in terms of failure to allege and prove materiality, held in substance that the false statement made was not "in [a] matter within the *jurisdiction* of a department or agency of the United States" (emphasis added), as required by 18 U. S. C. 1001. This becomes clear when the *Rolland* decision is read in the light of *United States* v. *Moore*, 185 F. 2d 92 (C. A. 5), which the *Rolland* decision cites. Materiality was discussed in *Moore* since the violation of 18 U. S. C. 1001 charged was under the first clause which requires materiality. However, the principal issue in *Moore* was whether the false statements were in a matter within the *jurisdiction* of the Wage and Hour Division, and the Fifth Circuit held in *Moore*, and reaffirmed in *Rolland*, that in making preliminary investigations to determine whether the employees of a business are covered by the Fair Labor Standards Act, the Administrator of the Wage and Hour Division is not exercising the jurisdiction conferred on him by the Act.[5] The technical pleading issue was

[4] Contrary to petitioner's contention (Pet. 8), the Court of Appeals for the District of Columbia in *Freidus* v. *United States*, 223 F. 2d 598, 602, fn. 13, expressly stated that it did not reach the question whether the indictment in that case, which was also cast in the words of 18 U. S. C. 1001, was insufficient for failure to specify materiality.

[5] The Fifth Circuit in its *Rolland* decision did not mention the fact that the *Moore* indictment was under the first clause

not central to the decision in *Rolland* and there is no significant or substantial conflict.

2. The cross-examination of petitioner as to his relationship with Carol Anderson was both relevant and proper under the circumstances.

Since petitioner admitted making the false statements as charged and denied only that he made them with any criminal intent (R. 264, 277, 319–321), the government's case turned upon whether it could show the jury that petitioner's avowed high purpose in lying to protect others, rather than to mislead the government, was a sham. When petitioner stated that he was only trying to shield his wife and Carol Anderson from questioning when he lied, and portrayed his relationship with Carol Anderson to be one of friendship, and his visits to her in prison to be motivated by sympathy and mercy (R. 288–289, 299, 341, 344, 363), he made his character and his relationship with Carol Anderson relevant factors in the case. The government was then forced to elicit on cross-examination just what that relationship was, and that his character was not as he had presented it to be. Cf. *Wilson* v. *United States,* 232 U. S. 563, 568–569; *United States* v. *Pagano,* 224 F. 2d 682, 686 (C. A. 2), certiorari denied, 350 U. S. 884.

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of 18 U. S. C. 1001, which specifically requires materiality. The distinction between the two cases on this point was not pointed out in the briefs before the Fifth Circuit until the government filed a petition for rehearing. Petition for Rehearing, No. 13,889, pp. 2–4. Since there were other grounds for its decision, the Fifth Circuit's denial of the petition does not necessarily mean that it rejected the distinction after it was called to its attention.

Petitioner was warned, both by the court and by government counsel, that his line of testimony on direct, while a witness in his own behalf, would open the door to a searching cross-examination (R. 290, 291). Petitioner's refusal to abandon it and his statement, through his counsel, that he wanted the jury to know the whole story (R. 291) renders inappropriate his objection now that his admissions of an illicit relationship with Carol Anderson were improperly brought out on cross-examination. Upon his insistence, the jury had the whole story.[6]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1956.

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[6] The case of *United States* v. *Provoo*, 215 F. 2d 531 (C. A. 2), cited by petitioner (Pet. 12–13), is inapposite here. In the *Provoo* case the defendant did not put his character in issue, and the questions as to his homosexuality had no relevance to a charge of treason.

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